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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

CHERRIE HAYWOOD, et al

Petitioners,

v.

GARY LOCKE
Secretary, United States Department of Commerce

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 6, 2010

QUESTIONS PRESENTED

1. For Purposes of Establishing A Prima Facie Case Of Accretion Of Duties Promotion Employment Discrimination Under The *McDonnell-Burdine* Paradigm, Can A Group of Female Federal Employees At The Grade Seven (7) Level, Use As Their Comparator, A Grade 13 White Male Federal Employee Who Received The Benefit of Agency's Noncompetitive Promotion Criterion That Was Denied to Agency's Female Employees?

2. Were There Enough Common Features Between the Female Members of the Haywood Group and Their White Male Comparator to Allow for a Meaningful Comparison That the Two Groups Were Similarly Situated in a Noncompetitive Promotion Context?

3. Should a Jury Have Been Allowed to Resolve the Factual Disputes Below Regarding (1) the Reality of Similarly Situated Federal Employees at Different Grade Levels Performing Additional Work-Related Duties and (2) the Reality of Intentional Discrimination By Agency in Applying Its Noncompetitive Promotion Criterion to Such Employees?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES viii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

The Haywood Group Performed The Additional Duties Of Patent Services Technicians At A Higher Grade Level Over A Substantial Period of Time 7

Director Knootz's Discriminatory Failure to Submit the Accretion of Duties Justification Form for Members of the Haywood Group 8

The Haywood Group's Job Duties Were Misclassified As Legal Instrument Examiners Rather Than The Higher Graded Duties Of Patent Services Technicians They Actually Performed 9

The Boilerplate (Sham) Desk Audit 10

REASONS FOR GRANTING WRIT 11

I. The Fourth Circuit Decision Below Conflicts With Precedents Of This Court And The Decisions of The Seventh Circuit As To The Role, Meaning And Use Of A Similarly Situated Comparator In The Establishment Of A Prima Facie Case of Employment Discrimination 11

A. The Fourth Circuit Use of the Similarly Situated Requirement Frustrates the Purposes of the Prima Facie Case 13

B. The Fourth Circuit's Use of the Similarly Situated Requirement Failed to Recognize That The Jury Was Entitled to Find That Petitioners Had Proven Intent to Discriminate In a Variety of Ways 16

C. The Fourth Circuit's Misuse of the Similarly Situated Requirement Unjustly Barred Petitioners as Non-White Male Employees From Statutory and Constitutional Protection 19

II. Contrary to the Fourth Circuit's Determination, Members of the Haywood Group Were Similar In All Relevant Respects to Their Comparator 20

A. Members of the Haywood Group and their Comparator Dealt With the Same Supervising Director of OIPE 20

B. Members of the Haywood Group and their Comparator Were Subject to the Same PTO Accretion of Duties Promotion Standards and Procedures 22

C. Members of the Haywood Group and their Comparator Engaged in the Same Promotion Qualifying Conduct of Performing Additional Work-Related Duties At A Higher Grade Level Over A Substantial Period of Time 23

III. The Fourth Circuit's Decision Relied Upon Irrelevant Factors in Finding That Members of the Haywood Group and Their Comparator Were Not Similarly Situated For Purposes of Establishing A Prima Facie Case of Employment Discrimination Under the *McDonnell- Burdine* Paradigm ...24

A. In An Accretion of Duties Promotion Context, the Job Title and Position of the Haywood Group Comparator Is An Irrelevant Factor 25

B. In An Accretion of Duties Promotion Context, the Fact That the Haywood Group Comparator's Position, Prior to His Promotion, Was Six Grade Above That of The Haywood Group Is An Irrelevant Factor 26

C. In An Accretion of Duties Promotion Context, the Fact That the Supervising Director Happens To Be the Third-Line Supervisor of Members of the Haywood Group and the Immediate Supervisor of Their Comparator Is Irrelevant 27

IV. Contrary to the Decision of the Fourth Circuit, In An Accretion of Duties Promotion Context, There Were Enough Common Features Between Members of the Haywood Group and Their Comparator to Allow for a Meaningful Comparison Under The Constitution and The *McDonnell-Burdine* Paradigm 28

V. The PTO Accretion of Duties Promotion Criterion As Disparately Applied To Higher Level and Lower Level Federal Employees In OIPE Violates Not Only ADEA and Title VII of the Civil Rights Act of 1964, as amended, but The Fifth Amendment of the Constitution of the United States 30

VI. The Resolution of the Intensely Disputed Factual Inquiry Regarding Similarly Situated and Intentional Discrimination Were Matters for the Jury; Not A Judge ... 32

VII. Excessive Technicality Rather Than Fairness Influenced and Guided The Fourth Circuit's Decision Affirming The District Court Below 33

CONCLUSION 36

APPENDIX

A. Order Denying Rehearing and Rehearing En Banc, September 7, 2010 ..... 1a

B. Per Curiam Memorandum Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit, July 6, 2010 ..... 3a

C. Memorandum Order and Final Judgment of the United States District Court for the Eastern District of Virginia, April 30, 2010 ..... 14a

D. Expert Witness Affidavit of Paul Katz ... 37a

E. PTO/OIPE Supervisory Accretion of Duties Promotion Justification Form for Kevin Little, June 23, 2000 ..... 43a

TABLE OF AUTHORITIES

Cases	Pages
Arnett v. Aspin, Secretary of Defense 846 F. Supp. 1234, 1241 (E.D. Pa. 1994)	5
Bolling v. Sharpe 347 U.S. 497 (1954)	19, 28
Chavez v. Ill. State Police 251 F. 3d 612, 636 (7th Cir. 2001)	12, 29
Culpepper v. Department of Agriculture, 2010 U.S. Dist. LEXIS 67824*49 (July 7, 2010)	30
Davis v. Passman 442 U.S. 228 (1979)	19, 28
Dimick v. Schiedt 293 U.S. 474, 486 (1935)	32
Elkhatib v. Dunkin Donuts, Inc. 493 F.3d 827, 832 (7th Cir. 2007)	13
Freeman v. Madison Metro. Sch. Dist. 231 F. 3d 374, 382-83 (7th Cir. 2000)	12
Galloway v. United States 319 U.S. 372,392 (1943)	32
Gordon v. National Youth Work Alliance 675 F. 2d 356, 360 (D.C. Cir. 1982)	33

Graham v. Long Island Railroad
230 F.3d 34, 39 (2nd Cir. 2000) 32, 33

Humphries v. CBOCS West, Inc.
474 F.3d 387, 405 (7th Cir. 2007)
aff'd on other grounds, 553 U.S. 442 (2008) .. passim

Jefferies v. Harris County Community
Action Association
615 F.2d 1025 (5th Cir. 1980) 5

Judge v. Marsh
649 F. Supp. 770,780 (D.D.C.1986) 5

Lam v. University of Hawaii
40 F.3d 1551,1562 (9th Cir.1994) 5

Lane v. Wilson
307 U.S. 268, 275 (1939) 36

Love v. Pullman
404 U.S. 522,527 (1972) 33

Marbury v. Madison
5 U.S. 137 (1803) 34

McDonnell Douglas Corporation v. Green
411 U. S. 792 (1973) ..... passim

Parklane Hosiery Co., Inc., v. Shore
439 U.S. 322, 337(1979) 27

Radue v. Kimberly-Clark, Corp.
219 F.3d 612 (7th Cir. 2000) 12

Swierkiewicz v. Sorema,N.A.
534 U.S. 506, 512 (2002) 29

Taylor v. County Bancshares, Inc.
325 F. Supp 2d 755, (E.D. Tex. 2004) 29

Texas Dept. Of Community Affairs v. Burdine
450 U.S. 248 (1981) ..... passim

Thiel v. Southern Pacific Co.
328 U.S. 217,224 (1946) 36

U.S. Postal Service v. Aikens
460 U.S. 711, 715 (1983) ..... passim

Zipes v. Trans World Airlines, Inc.
455 U.S. 385 (1982) 33

OTHER AUTHORITIES

U. S. Constitution

Fifth Amendment,
United States Constitution 3, 36

Seventh Amendment,
United States Constitution ..... passim

Statutes

28 U.S.C. §1254 2

42 U.S.C. §2000e-16(e) ..... passim

Federal Rules of Civil Procedure

Rule 38 4

Rule 39 4

Rule 56 4

Federal Rules of Appellate Procedure

Fed. R. App. P. 43(c) (2) 5

Regulations

5 C.F.R. § 335.103(c)(ii) 22

Agency Policy, Procedure or Practice

PTO's Accretion of Duties Promotion Criteria . 22, 23

U.S. DOC's Inspector General's Reports

Inspector General's Public Release
"PTO Improved Internal Controls Needed
for Office of Human Resources", 09/00 17

Inspector General's Public Release
"USPTO Needs Strong Office of Human
Resources Management Capable of
Addressing Current and Future
Challenges", 06/04 17

Inspector General Release ("USPTO Should Reassess How Examiner Goals, Performance Appraisal Plans, and The Award System Stimulate and Reward Examiner Production, 09/04 17

Inspector General's Top Ten Management Challenges 09/05 17

Inspector General's Statement Summarizing the Major Management and Performance Challenges facing the U.S. Patent and Trademark Office, 12/05 18

Miscellaneous

Lidge, The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law, 67 Mo. L. Rev. 831 (2002) 16, 19

Beckles, Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No "Similarly Situated" Comparators?, 10 U. Pa. J. Bus. & Emp. L. 459 (2008) 16

Sullivan, The Phoenix from the Ash: Proving Discrimination by Comparators, 60 Ala. L. Rev.191 (2009) 16

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PETITION FOR WRIT OF CERTIORARI

The petitioners[1], Cherrie Haywood, Theresa Williams, Kathy Nelson, Karen Smith, Marian Day, Tushome Stokes, Deshawn Durham, Roxanne Rawls, and Eleanor Kurtz, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 6, 2010.

OPINION BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit is not published nor reported, it appears in Appendix B hereto at pages 3a-13a. The order and final judgment rendered by the United States District Court for the Northern District of Virginia are reported at 106 Fair Empl. Prac. Cas. 356 (2009) and they appear in Appendix C hereto as pages 14a-36a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 6, 2010. A timely petition for rehearing en banc was denied on September 7, 2010 (App. 1a-2a). This Court's jurisdiction is invoked under 28 U.S.C. §1254.

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[1]Petitioners are nine of the ten plaintiffs who appeared as parties below in the United States Court of Appeals for the Fourth Circuit and the United States District Court. John Dill was a party below but is not a party in this petition for certiorari. All of the current nine petitioners are female current or former employees of the United States Patent and Trademark Office. Eight of the petitioners are black and one petitioner (Eleanor Kurtz) is white.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Fifth and Seventh Amendment, Title VII of the Civil Rights Act of 1964, as amended, ADEA and Rules 38, 39 and 56 of the Federal Rules of Civil Procedure.

In pertinent parts the Fifth Amendment to the United States Constitution provides:

No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the United States Constitution preserving the right of trial by jury provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

In pertinent parts, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16(e) expressly recognizes and imposes a nondelegable duty on federal agencies and federal officials to eradicate unlawful and unconstitutional employment discrimination as follows:

> "Government agency or official are not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes...relating to equal employment opportunity in the Federal Government."

See, 42 U.S.C. §2000e-16(e).

The federal civil rules involved are Rule 38, Rule 39 and Rule 56 of the Federal Rules of Civil Procedure.

Rule 38 provides in pertinent part:

> (a) *Right preserved.* The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by an applicable statute shall be preserved to the parties inviolate.

STATEMENT OF THE CASE

The current Petitioners (nine female federal employees)(hereafter "the Haywood Group") are seeking certiorari to review the Fourth Circuit's decision in favor of the United States Patent and Trademark Office ("USPTO" or "PTO"), an agency of the U.S. Department

of Commerce and the federal government. Petitioners filed their complaint below alleging a violation of their statutory and constitutional rights not to be unlawfully discriminated against because of their race, sex, and the intersection[2] of their race, sex and age. Respondent Gary Locke[3] was sued in his capacity as the Secretary of the U.S. Department of Commerce. (JA-22). This was a jury demanded case.

Members of the Haywood Group maintained that they were unlawfully denied earned accretion of duties promotions as was granted to a similarly situated white male employee in the Office of Initial Patent Examination ("OIPE"). The members of the Haywood Group joined together in one action asserting similar violations of law and seeking similar claims for relief that derived from the fact that each was treated differently by the (1) Director of OIPE, Thomas Koontz, when he intentionally failed to complete an accretion of duties promotion justification form for them as he did

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[2]Petitioners relied on theories of both multiple and intersectional discrimination claims because their comparator, Kevin Lattle, and the Director of OIPE, Thomas Koontz, are white males; while all of the members of the Haywood group are non-white males. *Cf.* Lam v. University of Hawaii, 40 F 3d 1551,1562 (9th Cir.1994); Jefferies v. Harris County Community Action Association, 615 F.2d 1025 (5th Cir. 1980); Judge v. Marsh, 649 F. Supp. 770,780 (D.D.C.1986); and Arnett v. Aspin, Secretary of Defense, 846 F. Supp. 1234, 1241 (E.D. Pa. 1994).

[3]The original Defendant in this action was Carlos M. Gutierrez, the then Secretary of the U.S. Department of Commerce. Mr Locke, the current Secretary of Commerce was automatically substituted as the defendant for Mr. Gutierrez, as former Commerce Secretary pursuant to Fed R. App. P. 43(c) (2).

for their similarly situated comparator, Kevin Little, a white male employee, and (2) PTO personnel office which used a sham and boilerplate desk audit (that did not reflect their actual performance of additional higher graded duties of Patent Services Technicians rather than their old job duties of Legal Instrument Examiners) to cover-up unlawful discrimination against them.

The members of the Haywood Group are similarly situated in PTO/OIPE to Kevin Little because, for the relevant time period, the members of the Haywood Group and Mr. Little worked under Thomas Koontz (Director, OIPE). As Director of OIPE, Mr. Koontz was responsible for the assignment of additional duties to members of the Haywood Group and their comparator. Mr. Koontz was Petitioners' third line supervisor and Mr. Little's first line or immediate supervisor. Petitioners and their comparator were subject to the same Human Resources office and its personnel. In addition, PTO/OIPE's applicable criterion for awarding accretion of duties promotion to PTO/OIPE employees applied equally to members of the Haywood Group and their comparator. (App.41a). Finally, as Director of OIPE, accretion promotions required the participation and completion of a written accretion of duties justification form by Mr. Koontz. (JA-1160).

The Haywood Group Performed The Additional Duties Of Patent Services Technicians At A Higher Grade Level Over A Substantial Period of Time

The USPTO grants patents for the protection of inventions and to register trademarks. (JA-22). Starting about 1998, certain employees in OIPE were impacted in the performance of their duties by management and legislative action that changed the way patent applications were received and processed, prior to their legal examination. (JA-1135). The Haywood Group, among others, were required to perform additional and more complex duties and responsibilities that were compounded by the introduction of a new contractor workforce in the federal workplace. (JA-1135). In recognition of the personnel management impact of the additional and complex duties performed by certain OIPE's employees, OIPE's management sought permanent promotions for those impacted by the additional performance of the complex and significance additional duties and responsibilities. (JA-1135, 1136, 1137). In response to the performance of these additional duties over a period of time, management in cooperation with the personnel office approved an accretion of duties promotion for Kevin Little from a GS-13 to a GS-14. (JA-1135). Pursuant to OIPE's accretion of duties promotion procedures, in June 2000, Thomas Koontz submitted an Accretion of Duties Justification form to personnel in support of Mr. Little's accretion of duties promotion to GS-14. (JA-1136-1138).

Director Koontz's Discriminatory Failure to Submit the Accretion of Duties Justification Form for Members of the Haywood Group

During the same time period, OIPE management and personnel determined that the impact of performing the additional duties and responsibilities on a select group of federal employees operating under the job titles of Legal Instrument Examiners would necessitate their promotion from the grade GS-7 to grade GS-8. (JA-1135). In fact, Mr. Koontz informed the Haywood Group that they would initially receive temporary promotion to the selected GS-8 positions until such time as the paperwork for permanent promotions to GS-8 could be completed. (JA-1047). During this same time period the Haywood Group began working with other PTO employees at the higher grade levels performing the same and similar complex duties as employees at GS-8 and higher grade levels. (JA-908). More specifically, former Lead LIEs at grade GS-8 were performing the same duties as the Haywood Group. (JA-909-910). Unlike the Haywood Group, the former Lead LIEs job titles were converted by PTO personnel to Patent Services Technicians and allowed to retain their grades at the GS-8 levels.(JA-909-910).

While the Haywood Group continued to perform at the GS-8 grade level, similar to the Patent Services Technicians, their second-line supervisor, Marian Hines, was assigned by Mr. Koontz to work with personnel to complete the new position descriptions to effect their permanent promotions to GS-8. (JA-939-940). During this period, Ms. Hines submitted several different position descriptions to Gail Zamperini in the

PTO personnel office justifying the permanent promotion of members of the Haywood Group. (JA-178-181). Ms. Hines repeatedly informed Mr. Koontz of the difficulties she was encountering with PTO in getting the permanent promotions approved. However, Mr. Koontz never submitted the required Accretion of Duties Justification forms to personnel in support of a permanent promotion for any of the members of the Haywood group as he had done in support of Mr. Little's accretion of duties promotion to GS-14. (JA-254).

The Haywood Group's Job Duties Were Misclassified As Legal Instrument Examiners Rather Than The Higher Graded Duties Of Patent Services Technicians They Actually Performed

After the Haywood Group had successfully performed the additional duties in OIPE for a year, based on their qualifications and the continuing needs of the agency, management requested and personnel extended each of the Haywood Group member's temporary promotion at GS-8 for an additional year. (JA-1184-1193). During this period Ms. Hines continued to pursue efforts to get PTO personnel office to approve the permanent accretion of duties promotions for the Haywood Group who were actually performing the additional and higher graded duties of Patent Services Technicians. (JA178-179, JA 909-910 and JA1136). Mr. Koontz, however, failed to submit the required Accretion of Duties Justification forms to personnel for any members of the Haywood Group. (JA-254). After successfully performing the higher graded duties and responsibilities for two years, the maximum allowable

time for temporary promotions, members of the Haywood Group time ran out and they were simply demoted in grade from GS-8 to GS-7 with their same old title of LIEs. (JA-1194-1203) and (App67a). However, after their demotions, the members of the Haywood Group were required by Mr. Koontz to continue to perform the same additional duties of Patent Services Technicians that they had performed while in the temporary GS-8 grade level, along side the higher graded Patent Services Technicians. (See JA- 909-910 and JA-1136).

The Boilerplate (Sham) Desk Audit

After members of the Haywood Group failed to receive the earned and promised permanent promotions to the grade 8 level, they requested a desk audit. (JA-1047). In response, the Human Resources function at PTO assigned Karen Long, an inexperienced employee from PTO Human Resources, who had never performed a prior desk audit to conduct it. (JA-22). PTO Human Resources used the so-called desk audits as a meaningless training exercise when it assigned another PTO Human Resources employee, Gail Zamperini, to train Karen Long to perform desk audits. (JA-809). Ms. Zamperini provided no input or guidance to Ms. Long and slept during most of the desk audit interviews training exercises for Karen Long. (JA-583-585). Ms. Long never completed any final desk audit reports of any of the members of the Haywood Group before she left PTO and Ms. Zamperini never submitted a desk audit report that reflected the actual higher graded duties that the Haywood Group performed and were

still performing during their interviews with Ms. Long. (JA-29).

With full knowledge that the Haywood Group were performing the same or similar duties and responsibilities of the higher graded Patent Services Technicians, among others, Gail Zamperini prepared and submitted a single boilerplate (sham) desk audit report that did not address the additional duties and responsibilities of GS-8 Patent Services Technicians as performed by members of the Haywood Group in PTO. (JA-1164-1171). Instead, Ms. Zamperini used the position of Paralegal Specialist as a pretext for denying members of the Haywood Group their earned permanent accretion promotions to the GS-8 grade level. (JA-1164-1171).

This petition for writ of certiorari is filed with this Court within 90 days of receipt of the Order denying rehearing. (App.1a-2a).

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit Decision Below Conflicts With Precedents Of This Court And The Decisions of The Seventh Circuit As To The Proper Application And Use Of A Similarly Situated Comparator In The Establishment Of A Prima Facie Case of Employment Discrimination

The Fourth Circuit decision below in this case creates a conflict with settled precedents of this court in

the *McDonnell-Burdine-Aikens* paradigm and decisions of the Seventh Circuit as to the proper role, meaning and use of a similarly situated comparator in the establishment of a prima facie case of employment discrimination. See, Humphries v. CBOCS West, Inc., 474 F.3d 387, 405 (7th Cir. 2007), aff'd on other grounds, 553 U.S. 442 (2008). While recognizing the existence of the above precedents, the Fourth Circuit turns the phrases "prima facie case" and "similarly situated" on their heads and has made it impossible for members of the Haywood Group to demonstrate intentional discrimination in a noncompetitive accretion of duties promotion context. See, Texas Dept. Of Community Affairs v. Burdine, 450 U.S. 248 (1981)("Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee"). See also, Humphries v. CBOCS West, Inc., 474 F.3d at 405 ("In addition, our case law does not provide any 'magic formula for determining whether someone is similarly situated.' Chavez v. Ill. State Police, 251 F. 3d 612, 636 (7th Cir. 2001)(discussing the similarly situated requirement in the equal protection context). Instead , courts should apply a 'common-sense' factual inquiry · · essentially, are there enough common features between the individuals to allow a meaningful comparison? Id. (citing Freeman v. Madison Metro. Sch. Dist., 231 F. 3d 374, 382-83 (7th Cir. 2000) and Radue, 219 F. 3d at 619). Put a different way, the purpose of the similarly situated requirement is to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination. See Hull, 445 F. 3d at 951-52."

A. The Fourth Circuit Use of the Similarly Situated Requirement Frustrates the Purposes of the Prima Facie Case

Based on the settled precedents of this Court and the decisions of the Seventh Circuit following such precedents, it is a well-settled statement of law that "the similarly situated inquiry is a flexible, common-sense comparison based on 'substantial similarity' that requires 'enough common features between the individuals to allow [for] a meaningful comparison.' See Humphries v. CBOC W., Inc., 474 F. 3d 387, 405 (7th Cir. 2007), aff'd on other grounds, 553 U.S. 442 (2008); Elkhatib v. Dunkin Donuts, Inc., 493 F.3d 827, 832 (7th Cir. 2007)." Here, the Fourth Circuit decision conflicts with not only the above decisions from the Seventh Circuit's application of the similarly situated inquiry, but the Fourth Circuit decision regarding similarly situated conflicts with the proper apprehension of the similarly situated inquiry as set forth in the three seminal cases of this Court in McDonnell Douglas v. Green, 411 U. S. 792 (1973); Texas Dept. Of Community Affairs v. Burdine, 450 U.S. 248 (1981); and U.S. Postal Service v. Aikens, 460 U.S. 711, 715 (1983). In McDonnell Douglas v. Green, 411 U. S. at 804, the Supreme Court stated that "[p]etitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." Moreover, in Texas Dept. Of Community Affairs v. Burdine, 450 U.S. at 258, the Court stated: "*McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that

similarly situated employees were not treated equally. [cite omitted]."

While the Fourth Circuit cites the appropriate cases in its decision, its application of the true and correct principles and teachings in such cases, regarding similarly situated employees, to the circumstances in this case demonstrates apparent misapprehension and misapplication of the law to the facts, thus, causing a miscarriage of justice and depriving Petitioners of their constitutional right to a trial by jury. For example, the Fourth Circuit's application of the similarly situated concept in the accretion of duties context below is tantamount to requiring a comparator, such as Mr. Little, to be an "exact match" to members of the Haywood Group in order to be a similarly situated employee. See App. 11a ("However, the performance of additional work-related duties is not the only relevant factor"). This application of the similarly situated concept to require a virtual exact match in an accretion of duties promotion context is inconsistent with this Court'srecedents teaching that a plaintiff has satisfied its task by demonstrating "that similarly situated employees were not treated equally." Texas Dept. Of Community Affairs v. Burdine, 450 U.S. at 258. It was clearly erroneous and a misuse of the similarly situated concept for the Fourth Circuit to compare the respective job duties and positions of members of the Haywood Group and their comparator within the USPTO in deciding that members of the Haywood Group and their "named comparator was actually quite dissimilar." App11a. Instead, the appropriate focus for the Court's comparison of respective job duties for accretion of duties purposes was between job duties actual

performed by members of the Haywood Group and the Patent Services Technicians. The improper focus of the Fourth Circuit below denied members of the Haywood Group meriting relief a fair opportunity to demonstrate unlawful discrimination. Texas Dept. Of Community Affairs v. Burdine, 450 U.S. at 258 ("We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination").

Mr. Little's performance of additional duties and Mr. Koontz's submission of the Accretion of Duties Justification Sheet in order to effect his permanent accretion of duties promotion was a relevant factor and a meaningful common basis for comparing the different treatment received by Mr. Little and members of the Haywood Group in their performance of additional higher graded duties in PTO/OIPE, yet not being promoted. Moreover, the use of the sham desk audit that did not reflect the actual work of the Patent Services Technicians, as performed by members of the Haywood Group, was also a meaningful common basis for comparing the unequal treatment received by Mr. Little and members of the Haywood Group. Therefore, it was a clear misuse of the similarly situated concept for the Fourth Circuit to compare irrelevant factors in determining that Mr. Little and members of the Haywood Group were "dissimilar" for purposes of establishing a prima facie case of employment discrimination. App.11a. This is especially so because members of the Haywood Group were not competing with their comparator for a promotion to the GS-14 grade level. Thus, a comparison of their respective job duties was meaningless and irrelevant. See Humphries

v. CBOC W., Inc., 474 F. 3d at 405. See generally, Lidge, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 Mo. L. Rev. 831 (2002); Beckles, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No "Similarly Situated" Comparators?*, 10 U. Pa. J. Bus. & Emp. L. 459 (2008) and Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 Ala. L. Rev. 191 (2009).

B. The Fourth Circuit's Use of the Similarly Situated Requirement Failed to Recognize That The Jury Was Entitled to Find That Petitioners Had Proven Intent to Discriminate In a Variety of Ways

The misuse of the similarly situated concept by the Fourth Circuit contravenes the spirit and teaching of this Court in *the McDonnell-Burdine-Aikens* triology of cases and their progeny recognizing that discriminatory intent can be proven in many different ways. See generally, Lidge, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 Mo. L. Rev. 831,856-859 (2002)("pointing to similarly situated employees was the most common way of proving discrimination, but it was not the only way"). See also, U.S. Postal Service v. Aikens, 460 U.S. at 715 ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant").

Notwithstanding the impediments placed on members of the Haywood Group in establishing a prima facie case in an accretion of duties context below, the Fourth Circuit still had before it sufficient evidence, with or without Mr. Little as a comparator, from which a jury could have found that PTO had intentionally discriminated against members of the Haywood Group. For example, Petitioners presented direct evidence of intentional discrimination from Marian Hines, a GS-13 federal employee in OIPE, who stated that Mr. Koontz had discriminated against her as an African-American female, when he promoted Mr. Little based on accretion of duties without given her an opportunity to compete with Mr. Little for promotion to the GS-14 grade level that Mr. Little received on a noncompetitive basis. JA169-172 ("I filed a complaint").

In addition, there was ample evidence in the record before the Fourth Circuit that the Human Resource office at PTO was dysfunctional and was repeatedly not following merit and equal employment opportunities principles and procedures in its operations and promotion of certain employees. See generally, (JA1265)(Inspector General's Public Release "PTO Improved Internal Controls Needed for Office of Human Resources", 09/00); (JA1275(Inspector General's Public Release "USPTO Needs Strong Office of Human Resources Management Capable of Addressing Current and Future Challenges", 06/04); (JA1291)(Inspector General Release ("USPTO Should Reassess How Examiner Goals, Performance Appraisal Plans, and The Award System Stimulate and Reward Examiner Production, 09/04); (JA1339)(Inspector General's Top Ten Management Challenges 09/05); and (JA1348)

(Inspector General's Statement Summarizing the Major Management and Performance Challenges facing the U.S. Patent and Trademark Office, 12/05).

Moreover, there was other direct evidence of intentional discrimination before the Fourth Circuit demonstrating that the members of the Haywood Group had successfully performed the higher graded duties of the Patent Services Technicians for two years, under so-called temporary promotions, and were required by Mr. Koontz to continue to perform the same duties after the so-called temporary promotion expired. This was at the time the sham desk audit was performed, and Mr. Koontz failed to submit Accretion of Duties Justification Forms for members of the Haywood Group, while extending the temporary promotion and submitting the Accretion of Duties Justification Form for Mr. Little who was known by Mr. Koontz to be at best borderline or marginally qualified for the accretion of duties promotion to the grade 14. See, JA 166-171; JA 184-186; JA 221; JA 907-910 and JA 1184-93. The Fourth Circuit lost sight of the proper "factual inquiry" in this employment discrimination case by improperly focusing on a prima facie case rather directly on the question of intentional discrimination.[4] See also, U.S. Postal Service v. Aikens, 460 U.S. at 715 ("The District Court...erroneously focused on the question of prima

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[4]Members of the Haywood Group provided expert evidence below to help focused the Court on the true factual inquiry in the case, i.e., intentional discrimination as follows: App66a ("In my opinion, the disparate treatment in the completion of (and failure to complete) the Accretion of Duties Justification Sheet by Mr. Koontz was the real difference in receipt of a permanent promotion based on accretion of duties").

facie case rather than directly on the question of discrimination"). See, Humphries v. CBOC W., Inc., 474 F. 3d at 405 ("It is important not to lose sight of the common-sense aspect of the inquiry").

C. The Fourth Circuit's Misuse of the Similarly Situated Requirement Unjustly Barred Petitioners as Non-White Male Employees From Statutory and Constitutional Protection

In reality, members of the Haywood Group and their comparator were similarly situated as they both performed additional duties at a higher grade level over a substantial period of time. However, "a disparate application of the accretion-of-duties criterion resulted in Mr. Little receiving the same type of promotion denied to members of the Haywood Group. (App at 11a). Under the circumstances of the accretion of duties promotion context of this case, the Fourth Circuit misuse of the similarly situated requirement has unjustly deprived members of the Haywood Group from maintaining their employment discrimination case against the federal government under either a statutory or constitutional basis. See,(App. at 11a) ("However, the performance of additional work-related duties is not the only relevant factor"). See also, Bolling v. Sharpe, 347 U.S. 497 (1954), Davis v. Passman, 442 U.S. 228 (1979). See generally, Lidge, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 Mo. L. Rev. 831 (2002).

II. Contrary to the Fourth Circuit Determination, Members of the Haywood Group Were Similarly In All Relevant Respects to Their Comparator

Contrary to the Fourth Circuit's decision, members of the Haywood Group set forth a prima facie case of unlawful discrimination pursuant to the McDonnell Douglas standard because the Haywood Group and Mr. Little were similarly situated in all relevant respects for purposes of the fair application and enjoyment of PTO's accretion of duties criteria and procedures. (JA-1135-1136).

A. Members of the Haywood Group and their Comparator Dealt With the Same Supervising Director of OIPE

Thomas Koontz as supervising Director of OIPE was the responsible management official in OIPE for facilitating the promotion of federal employees performing additional work-related duties over a substantial period of time. See, App 6a . Accordingly, it was Mr. Koontz's disparate application of PTO's accretion of duties promotion criterion to members of the Haywood Group and their comparator that resulted in Mr. Little receiving the accretion of duties promotion that was denied to members of the Haywood Group. See, (App.6a) ("The temporary promotion of each employee to Lead LIE was supposed to terminate at the end of one year; however, plaintiffs' third-line supervisor and the director of OIPE, Thomas Koontz, persuaded the USPTO to extend and renew the temporary promotions for an additional year"). See also, (App.10a) ("...Koontz submitted the appropriate

form to personnel in support of Little's application. The promotion was approved and went into effect in July 2000"). This was evidence of intentional discrimination. (App 40a) ("In my opinion, the disparate treatment in the completion of (and failure to complete) the Accretion of Duties Justification Sheet by Mr. Koontz was the real difference in the receipt of a permanent promotion based on accretion of duties").

There was sufficient evidence for the jury to find intentional discrimination below. See, (App41a) ("The two groups should have received the same treatment. As long as Kevin Little's promotion remains, the Cherrie Haywood group of at least eleven Legal Instrument Examiners should have their promotions to GS-8 remain. For purposes of accretion of duties purposes based on situation A of the Agency's basis for accretion promotion in OIPE, both groups were similarly situated under the direction of Mr. Koontz, the person who completes the accretion justification sheet as Director of OIPE"). Accordingly, certiorari should be granted to correct the Fourth Circuit erroneous ruling that members of the Haywood Group did not make out a prima facie case of employment discrimination under Title VII because, as GS-7 federal employees, they were not similarly situated with Kevin Little in PTO/OIPE because of the degree of supervisory separation between members of the Haywood Group and the comparator. (App. 11a) ("Koontz was Little's immediate supervisor, but Koontz, as Director of OIPE, was three managerial levels above the LIEs and Lead LIEs").

B. Members of the Haywood Group and their Comparator Were Subject to the Same PTO Accretion of Duties Promotion Standards and Procedures

In the federal government, an accretion of duties promotion is a noncompetitive promotion which allows an eligible employee to obtain a higher grade level without competition with other employees. (JA-124). Thus, an accretion of duties promotion results "from an employee's position being classified at a higher grade because of additional duties and responsibilities." See (JA 124) quoting 5 C.F.R. § 335.103 (c) (3) (iii).

The same basis for awarding the accretion of duties promotion to Kevin Little in PTO/OIPE was equally applicable to members of the Haywood Group. (App 40a-41). The two basis for awarding an accretion of duties promotion in PTO are as follows: first, the "'old' position has been absorbed into the new position. The employee continues to perform the same basic functions, and the additional duties represent an outgrowth of the 'old' position over a significant period of time (usually six months but not less than three)." The second basis for earning an accretion of duties promotion in PTO requires that "a program change requires (required) the immediate performance of additional duties that only the subject employee is (was) capable of performing." (App 38a-39a and 42a).

When the accretion of duties promotion is based on the first situation described in the above paragraph, the management or supervising official in PTO is required to "describe the additional higher level duties the

employee has assumed and indicate the approximate period of time (i.e, the number of months) the employee has actually performed those higher level duties." (App 39a). When the accretion of duties promotion is based on the second situation describe above, the management or supervising official in PTO is required to briefly describe the program change and the additional, higher level duties the employee must (was required) to perform as a result of the change. Id.

C. Members of the Haywood Group and their Comparator Engaged in the Same Promotion Qualifying Conduct of Performing Additional Work-Related Duties At A Higher Grade Level Over A Substantial Period of Time

The Fourth Circuit incorrectly concluded that Mr. Little was not similarly situated to members of the Haywood Group for accretion of duties promotion purposes. (App.11a-12a). Contrary to the Fourth Circuit's decision, members of the Haywood Group were not contending that they performed the same duties as Mr. Little or that they were at the same grade level as Mr. Little. Instead, the members of the Haywood group demonstrated that they were similarly situated to Mr. Little because they were performing additional duties at a higher grade level over a substantial period of time requiring the Director of OIPE to complete and submit to PTO Office of Human Resources, a similar accretion of duties justification sheet describing their increased duties as was submitted for Kevin Little by Mr. Koontz. (App.41a). Thus, by identifying the applicable criterion

for obtaining an accretion of duties promotion and showing the disparate application of this accretion of duties criterion in OIPE, members of the Haywood group fully met the test of McDonnell Douglas v. Green and Texas Dept. of Community Affairs v. Burdine, "to demonstrate that similarly situated employees were not treated equally." (JA-1134-1136).

III. The Fourth Circuit Decision Relied Upon Irrelevant and Minor Factors in Finding That Members of the Haywood Group and Their Comparator Were Not Similarly Situated For Purposes of Establishing A Prima Facie Case of Employment Discrimination Under the *McDonnell-Burdine* Paradigm

In the case below, the Fourth Circuit narrowly defined use of the similarly situated requirement and failed to recognize that minor or irrelevant distinctions can always be identified between federal employees seeking earned accretion of duties promotions. For example, in a non-competitive accretion of duties promotion situation, the following factors relied upon by the Fourth Circuit were irrelevant and should not have formed the basis for affirming the grant of summary judgment based on a failure to establish a prima facie case: (1) that members of the Haywood Group and their comparator have different job duties and position titles within PTO; (2) that Petitioners' and their comparator's positions were six grades apart; and that members of the Haywood Group and their comparator had different degrees of supervisory dealing with the supervising Director for OIPE who is responsible for approving

additional duties performed by employees in OIPE as third-line supervisor or immediate supervisor and submitting the Accretion of Duties Justification Sheet to PTO's Office of Human Resources.

A. In An Accretion of Duties Promotion Context, the Job Title and Position In OIPE Members of the Haywood Group and Their Comparator Is An Irrelevant Factor

Contrary to the Fourth Circuit's decision, members of the Haywood group were not seeking to compare their job title and position in OIPE with their comparator. Rather, members of the Haywood Group maintained that they set forth a prima facie case of unlawful discrimination pursuant to the McDonnell Douglas model because the Haywood Group and Mr. Little were similarly situated for purposes of the application and enjoyment of PTO's accretion of duties criteria and procedures. (App 41a). Moreover, as it related to job title, duties actually performed and position in OIPE, members of the Haywood Group for accretion of duties purposes were comparing themselves to GS-8 Patent Service Technicians in OIPE to demonstrate that they had performed additional duties at a higher grade level over a substantial period of time. For accretion of duties promotion qualifying conduct and performance purposes, the relevant and proper comparison of the Haywood Group related to the job title, job duties and position in OIPE of the positions of the GS-8 Patent Service Technicians. However, for the

non-discriminatory application of PTO's accretion of duties promotion standards to similarly situated federal employees actual performing additional duties over a substantial period of time, Kevin Little was an appropriate comparator for establishing a prima facie case of unlawful denial of an earned accretion of duties promotions to members of the Haywood Group.

B. In An Accretion of Duties Promotion Context, the Fact That the Haywood Group Comparator's Position, Prior to His Promotion, Was Six Grade Above That of The Haywood Group Is An Irrelevant Factor

The Fourth Circuit erred when it ruled that the Haywood Group did not make out a prima facie case of employment discrimination under Title VII because, as GS-7 federal employees, they were not similarly situated with Kevin Little in PTO/OIPE because Mr. Little was six grades above them at the time he received his accretion of duties promotion to grade GS-14. (App.11a-12a).

In affirming the grant of summary judgment below, the Fourth Circuit did not correctly distinguish between competitive promotions and non-competitive accretion-of-duties promotions in the establishment of a prima facie case of unlawful employment discrimination. By finding that non-white male federal employees who were denied accretion of duties promotions at lower pay grade levels were not similarly

situated to a white male federal employee who was granted an accretion of duties promotion at a higher grade level, the Fourth Circuit has applied the wrong standard for determining similarly situated persons in accretion of duties promotions. This is because accretion of duties promotions are non-competitive promotions and federal employees whose grades are actually mis-classified at different grade levels are not prohibited from using as their comparator a similarly situated comparator who is performing different job duties in the Agency and are not competing with each other for accretion promotions. The lower federal courts in this case have misapprehended and misapplied the teaching of the Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1993) and its progeny and created a conflict with decisions of another federal courts of appeals. Humphries v. CBOCS West, Inc., 474 F.3d 387, 405 (7th Cir. 2007), aff'd on other grounds, 553 U.S. 442 (2008).

C. In An Accretion of Duties Promotion Context, the Fact That the Supervising Director Happens To Be the Third-Line Supervisor of Members of the Haywood Group and the Immediate Supervisor of Their Comparator Is Irrelevant

By expert testimony below, members of the Haywood Group established that: "The two groups should have received the same treatment....For purposes of accretion of duties purposes based on

situation A of the Agency's basis for accretion promotion in OIPE, both groups were similarly situated under the direction of Mr. Koontz, the person who completes the accretion justification sheet as Director of OIPE." (App.41a). The fact that Mr. Koontz was the third-line supervisor to members of the Haywood Group and the immediate supervisor of Mr. Little was a minor or irrelevant factor in a noncompetitive accretion of duties context.

IV. Contrary to the Decision of the Fourth Circuit, In An Accretion of Duties Promotion Context, There Were Enough Common Features Between Members of the Haywood Group and Their Comparator to Allow for a Meaningful Comparison Under The Constitution and The *McDonnell-Burdine* Paradigm

Contrary to the Fourth Circuit Ruling, in a non-competitive accretion of duties promotion situation under Agency's criterion, the performance of additional work-related duties at a higher grade level over a substantial period of time is the most relevant and determinative factor in receiving an accretion of duties promotion in PTO. As stated previously in this petition, there were enough common features between members of the Haywood Group and their comparator to allow for a meaningful comparison under both the Constitution and the Title VII based *McDonnell-Burdine* paradigm. See, Bolling v. Sharpe, 347 U.S. 497 (1954) and Davis v. Passman, 442 U.S. 228 (1979).

Precedents of this Court have established that the *McDonnell Douglas* paradigm was "never intended to be rigid, mechanized, or ritualistic." U.S. Postal Service v. Aikens, 460 U.S. 711, 715 (1983). See also, Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512 (2002). See also, Taylor v. County Bancshares, Inc., 325 F. Supp 2d 755, (E.D. Tex. 2004)("Because discrimination exists 'in forms as myriad as the creative perverseness of human being can provide, certain specific elements do not constitute the alpha and omega' of a prima facie case"). Further see, Humphries v. CBOCS West, Inc., 474 F.3d at 405 ("Establishing a prima facie case should not be such an onerous requirement: 'the plaintiff's evidence on the prima facie case need not be overwhelming or even destined to prevail; rather, the plaintiff need present only 'some evidence from which one can infer that the employer took adverse action against the plaintiff on the basis of a statutory proscribed criterion").

There were clearly enough common features between members of the Haywood Group and their comparator to allow for a meaningful comparison under both the Constitution and The *McDonnell-Burdine* Paradigm. See, Humphries v. CBOCS West, Inc., 474 F.3d at 405, and Chavez v. Ill. State Police, 251 F. 3d 612, 636 (7th Cir. 2001). Contrary to the Fourth Circuit's determination, members of the Haywood Group met their burden of establishing a prima facie case with and without Mr. Little as their comparator. In the noncompetitive, accretion of duties promotion context below, Petitioners' established a prima facie case of discrimination by showing the following: (1) they are members of a protected class; (2) they sought or

applied and was generally qualified for upgrades; (3) they did not receive the promotions; and (4) a similarly situated employee who was not a member of their protected class received a noncompetitive promotion under circumstances in which they were denied. See generally, Culpepper v. Department of Agriculture, 2010 U.S. Dist. LEXIS 67824*49 (July 7, 2010) and Humphries v. CBOCS West, Inc., 474 F.3d at 405 ("It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees - - distinctions can always be found in particular job duties or performance histories or the nature of the alleged transgressions").

V. The PTO Accretion of Duties Promotion Criterion As Disparately Applied To Higher Level and Lower Level Federal Employees In OIPE Violates Not Only The ADEA and Title VII of the Civil Rights Act of 1964, as amended, But The Fifth Amendment of the Constitution of the United States

The chief dispute in this case involves non-competitive accretion of duties promotion under the applicable accretion of duties promotion criterion of the USPTO. The applicable PTO's accretion of duties promotion criterion was applied to effect the promotion of a white male higher level PTO employee, but was not applied to the lower level non-white male PTO employee. Because both the higher level white male PTO employee and the lower level non-white male PTO employee met the criterion for permanent accretion of

duties promotions, the opportunity of obtaining an accretion of duties promotion was made available by PTO as an agency of the federal government, it was a right which must be made available to all employees of PTO on equal terms. Similarly to the right to vote, to serve on a jury, and the opportunity to obtain a public education, once undertaken by a federal agency, the opportunity to obtain an accretion of duties promotion is a right or opportunity that must be provided to all federal employees who qualify on a non-discriminatory basis. (*See*, App. 41a)("The two groups should have received the same treatment").

In the lower federal courts, the Haywood group alleged that they were denied the benefits of accretion of duties promotions because they are all non-white males. (JA-18). The Haywood Group compared themselves with Kevin Little, a similarly situated white male employee in PTO, who received the benefits of an accretion of duties promotion during the same time period that members of the Haywood Group were denied an equal opportunity to obtain accretion of duties promotions. (JA-18). The Haywood Group met all of the agency's eligibility criteria for obtaining the accretion of duties promotions, i.e., they admittedly were performing, for a substantial period of time, increased duties beyond their GS-7 classified levels. (JA-178-179,JA-184-186 and JA -1184-1193). The Haywood Group maintains that Kevin Little was given a permanent accretion of duties promotion in 2000 because the white male Director of OIPE, Thomas Koontz, submitted an accretion of duties justification form to PTO personnel office supporting Mr. Little's accretion of duties promotion but intentionally failed to

do the same for them. (JA-1136). Mr. Koontz submitted the accretion of duties justification form for Mr. Little because he and Mr. Little are white males. (JA-74-75).

VI. The Resolution of the Intensely Disputed Factual Inquiry Regarding Similarly Situated and Intentional Discrimination Were Matters for the Jury; Not A Judge

This was a jury demanded case by members of the Haywood Group. Of course, the most fundamental element of a jury trial is its fact-finding function. Galloway v. United States, 319 U.S. 372,392 (1943). Accord, Parklane Hosiery Co., Inc., v. Shore, 439 U.S. 322, 337(1979). In fact, under the Seventh Amendment to the Constitution of the United States, the plain meaning of its text, and settled precedent of this Court interpreting the text, makes clear that the examination and determination of disputed facts in a civil jury trial is unambiguously the province of the jury - - not that of a judge. *See*, *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

By incorrectly deciding the similarly situated question, the Fourth Circuit deprived Petitioners of their Seventh Amendment right to a trial by jury and created a conflict with a decision of another federal court of appeals. See, Graham v. Long Island Railroad, 230 F.3d 34, 39 (2nd Cir. 2000)("Whether two employees are similarly situated ordinarily presents a question of fact for the jury"). Contrary to the Fourth Circuit ruling, it was a jury question whether members of the Haywood group and Kevin Little were similarly situated in OIPE requiring equal application of the

Agency's stated accretion of duties policy and procedure to all employees of OIPE. See, Graham v. Long Island Railroad, 230 F.3d at 39. See also, Humphries v. CBOCS West, Inc., 474 F.3d at 405 ("In other words, the inquiry simply asks wether there are sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination or retaliation - - recall that the plaintiff need not prove anything at this stage").

VII. Excessive Technicalities, Rather Than Fairness, Influenced and Guided The Fourth Circuit's Decision Affirming The District Court Below

The Fourth Circuit relied on excessive technicalities regarding establishment of a prima facie case and a similarly situated comparator rather than the guiding principle of fundamental fairness that is mandatory under the Constitution, Title VII, the ADEA and the Federal Rules of Civil Procedure. Cf. Gordon v. National Youth Work Alliance, 675 F. 2d 356, 360 (D.C. Cir. 1982), referring to Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) and Love v. Pullman, 404 U.S. 522,527 (1972).

Having been blinded by excessive technicalities, the Fourth Circuit lost sight of the clear Congressional intent set forth in pertinent parts of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16(e) expressly recognizing and imposing a nondelegable duty on federal agencies and federal officials to eradicate

unlawful and unconstitutional employment discrimination as follows:

> "Government agency or official not relieve of responsibility to assure nondiscrimination in employment or equal employment opportunity. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes...relating to equal employment opportunity in the Federal Government."

See, 42 U.S.C. §2000e-16(c).

The plain language employed by Congress in 42 U.S. C. § 2000e-16(c) is the foremost guide to Congress' intention in empowering federal employees, in certain circumstances, to use both the Constitution and federal statutes to assure the promise and guarantee of nondiscrimination in the federal workplace. The lower federal courts in this case had jurisdiction and power to not only remedy such unlawful and unconstitutional conditions, but a duty to clearly state to an erring federal agency what federal civil rights statutes and the Constitution meant in prohibiting invidious discrimination in the federal workplace. Cf, *Marbury v. Madison*, 5 U.S. 137, 163 (1803)(Marshall, CJ)("The government of the United States has been emphatically termed a government of laws, and not men. It will certainly cease to deserve this high appellation, if the

laws furnish no remedy for the violation of a vested legal right").

Because the Fourth Circuit erroneously thought that members of the Haywood Group had not established a prima facie case of employment discrimination, and that Mr. Little was not an adequate comparator, it erroneously gave short shrift to the Haywood Group's important and serious constitutional questions raised in the litigation below.[5] Certiorari is

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[5]The language of the Fourth Circuit speaks for itself: "Because the United States has clearly waived its sovereign immunity as to Title VII claims, see 42 U.S.C.A. § 2000e-16, the district court had subject matter jurisdiction over what were merely Title VII claims dressed in constitutional language. However, as we have previously held, plaintiffs' Title VII claims fail on the merits." App. 13a. In the Aikens case, this Court vacated the judgment of a Court of Appeals and remanded the case to the District Court because "we cannot be certain that its findings of fact in favor of the Postal Service were not influenced by its mistaken view of the law." 460 U.S. at 717. Moreover, in McDonnell Douglas, this Court was absolutely clear regarding the fundamental essence and meaning of Title VII. The language of this Court is instructive: "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." 411 U.S. at 800. Instead of addressing the Haywood Group's valid constitutional claims on their merits, in its correction of the erroneous ruling of the District Court on this point, the Fourth Circuit mistakenly viewed and dismissed the Haywood Group's separate and independent constitutional claims as a mere Title VII claim clothed in constitutional language. Surely, accretion-of-duties promotions in a federal agency cannot be constitutionally limited to higher graded federal employees to the wholesale exclusion of lower graded federal employees, such as members of the Haywood Group, that are performing additional

necessary to correct the Fourth Circuit's mistaken view of the Haywood Group's independent claims under the Fifth Amendment for constitutional violations of their rights not to be unlawfully discriminated against by the federal government in its distribution of earned benefits to its lower level and high level employees. Compare, Thiel v. Southern Pacific Co., 328 U.S. 217,223 (1946)("One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month. In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror"). Compare also, Lane v. Wilson, 307 U.S. 268, 275 (1939)(recognizing that the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination").

CONCLUSION

For these reasons, a writ of certiorari should issue to review the memorandum opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

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work-related duties at a higher grade level over a substantial period of time. Cf, Thiel v. Southern Pacific Co., 328 U.S. 217,224 (1946)("Thus a blanket exclusion of all daily wage earners, however well-intentioned and however justified by prior actions of trial judges, must be counted among those tendencies which undermine and weaken the institution of jury trial").

Respectfully submitted,

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December 6, 2010

APPENDIX A

FILED: September 7, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1604
(1:08-cv-00981-BGL-JFA)

CHERRIE HAYWOOD; THERESA L. WILLIAMS; KATHY L. NELSON; KAREN SMITH; MARIAN E. DAY; TUSHOMBE A. STOKES; DESHAWN D. DURHAM; ROXANNE RAWLS; ELEANOR KURTZ; JOHN DILL

Plaintiffs - Appellants

v.

GARY LOCKE, Secretary, United States Deparment of Commerce, United States Patent and Trademark Office

Defendant - Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge Motz and Senior Judge Alarcon.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1604

CHERRIE HAYWOOD; THERESA L. WILLIAMS; KATHY L. NELSON; KAREN SMITH; MARIAN E. DAY; TUSHOMBE A. STOKES; DESHAWN D. DURHAM; ROXANNE RAWLS; ELEANOR KURTZ; JOHN DILL,

Plaintiffs - Appellants,

v.

GARY LOCKE, Secretary, United States Deparment of Commerce, United States Patent and Trademark Office,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:08-cv-00981-GBL-JFA)

Argued: May 12, 2010 Decided: July 6, 2010

Before TRAXLER, Chief Judge, MOTZ, Circuit Judge, and Arthur L. Alarcon, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Robert L. Bell, BELL LAW FIRM, Washington, D.C., for Appellants. Bernard G. Kim, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Dana J. Boente, United States Attorney, Kevin J. Mikolashek, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

The plaintiffs in this case ("the Haywood Group") are ten current and former employees of the United States Patent and Trademark Office of Initial Patent Examination ("OIPE"). They claim they were unlawfully discriminated against on the basis of race and gender[1] in the denial of an "accretion-of-duties" promotion. The district court found the Haywood Group did not establish a prima facie case under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e et seq. (West 2000) ("Title VII"), or the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C.A. § 621 et seq., (West 2008) ("ADEA), or rebut the U.S. Patent and Trademark Office's ("UPTO") nondiscriminatory explanation for its failure to promote the plaintiffs in accordance with the burden-shifting rules established by the Supreme Court in McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1973). Additionally, the members of the Haywood Group alleged they were subjected to an unconstitutional hostile work environment in violation of their Fifth Amendment rights to due process and equal protection under the law. The district court dismissed the Haywood Group's constitutional claims for lack of subject matter jurisdiction, and, in the alternative, for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). We agree with the district court that the plaintiffs failed to establish a prima facie case of discrimination and affirm the grant of partial summary judgment on that basis. Because

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[1]Eight of the ten plaintiffs are black females, one plaintiff is a Caucasian female, and the final plaintiff is a black male.

of this ruling we need not reach the question of pretext. We also affirm the district court's dismissal of the Haywood Group's constitutional claims.

I.

The Haywood Group consists of ten current and former employees of the OIPE. OIPE receives incoming patient applications and screens them before forwarding them to the appropriate Patent Technology Center for examination. Around 2000 the OIPE underwent a reorganization that implemented a new automated patent application processing system. Many functions previously performed by federal employees were transferred to contract personnel and the automated system. As a result, a number of the OIPE's Legal Instrument Examiners (LIEs") were reassigned to various Patent Technology Centers. However, a group of LIEs, including the Haywood Group, stayed within the department and were temporarily promoted to "Lead LIEs" that summer in order to help contract personnel transition into the duties originally performed by the LIEs prior to reorganization. The temporary promotion to Lead LIE meant an increase in pay grade from GS7 to GS-8. The primary operational difference between the LIE position and the Lead LIE position was that the Lead LIEs performed supervisory functions over a group of at least three LIEs.

The temporary promotion of each employee to Lead LIE was supposed to terminate at the end of one year; however, plaintiffs' third-line supervisor and the director of OIPE, Thomas Koontz, persuaded the

USPTO to extend and renew the temporary promotions for an additional year. Later, around July 2002, all of the temporary GS-8 Lead LIEs were informed that their temporary positions would expire in August and they would return to their original GS-7 pay grade. At that time, plaintiffs sought accretion-of-duties promotions[2] to maintain their GS-8 pay grade. In response, the USPTO's Office of Human Resources ("OHR") conducted a desk audit of plaintiffs' work tasks to determine whether such a promotion was warranted. A desk audit is an evaluation used by OHR, according to standards developed by the United States Office of Personnel Management, to determine if employees are being paid fairly for the duties they actually perform. OHR determined after the desk audits that the plaintiffs' positions were appropriately categorized within the GS-7 pay grade. The Haywood Group then filed a claim of discrimination. Upon investigation, USPTO's Office of Civil Rights and the EEOC found no discrimination and issued a right to sue letter.

Thereafter, in September 2008, the plaintiffs filed their complaint against Carlos Gutierrez, United States Department of Commerce Secretary[3] in the

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[2]An accretion-of-duties promotion is a "promotion resulting from an employee's position being classified at a higher grade because of additional duties and responsibilities." 5 C.F.R. § 335.103 (c) (3) (ii) (2009). This type of promotion allows employees to obtain a higher GS level without having to go through the competitive process. See id. § 335.103 (c) (3) (2009).

[3]Gary Locke, the current Secretary of Commerce, is automatically substituted for former Secretary Gutierrez as the

United States District Court, Eastern District of Virginia, alleging constitutional violations ad race and gender discrimination in violation of Title VII and the ADEA. After discovery, the defendant moved for partial summary judgment as to plaintiffs' discrimination claims. The district court concluded the plaintiffs failed to show they were treated differently than a similarly situated employee and therefore could not establish a prima facie case of discrimination. Haywood v. Gutierrez, 2009 WL 1208111, at *6 (E.D. Va. Apr. 30, 2009). The district court granted the motion for partial summary judgment on that basis and, in the alternative, found the plaintiffs also failed to show defendant's nondiscriminatory reason for denying the promotion was pretextual. Id. at *8. Additionally, the court granted defendant's partial motion for dismissal fo the remaining claims, holding that the plaintiffs' constitutional claims failed under Federal Rule of Civil Procedure 12(b) (1) and, alternatively, under Rule 12(b) (6) because the United States did not waive its sovereign immunity and the plaintiffs could not bring Bivens claims against an agent of the federal government in his official capacity. Id. At *9; see Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); FDIC v. Meyer, 510 U.S. 471 (1994).

II.

The court reviews the district court's grant of summary judgment de novo. Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 283 (4th Cir. 2004). A motion for summary judgment should be granted if

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defendant-appellee to this action. Fed. R. App. P. 43(c) (2).

"there is no genuine issue as to any material facts and [ ] the movant is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 47 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c) (2)).

To establish a prima facie case of discrimination in the failure-to-promote context, the Haywood Group must show that they are members of a protected class who applied for a promotion for which they were qualified, and were denied the promotion despite their qualifications, under circumstances that give rise to an inference of discrimination. Tex. Dep't. of Comty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); McDonnell Douglas Corp., 411 U.S. at 802. Plaintiffs argued below that the OIPE subjected them to discriminatory treatment on the basis of race while making promotion determinations by treating a similarly situated white employee ("comparator") in a substantially different and more favorable manner than they were treated.

In appealing the district court's grant of summary judgment, plaintiffs argue the district court erred in finding their comparator's position and job duties were substantially different from theirs and hence that the comparator was not similarly situated. Plaintiffs are not required as matter of law to point to a similarly situated comparator to succeed on a discrimination claim. Bryant v. Aiken Reg'l Med. Ctrs., Inc., 333 F.ed 536, 545 (4th Cir. 2003). However, in this case, the plaintiffs have based their allegations completely upon a comparison to an employee from a non-protected class, and therefore the validity of their prima facie case depends upon whether that

comparator is indeed similarly situated. Burdine, 450 U.S. at 258 (citing McDonnell Douglas, 411 U.S. at 804) ("[I]t is the plaintiff's task to demonstrate that similarly situated employees were not related equally.")

Accordingly, plaintiffs are required to show that they are similar in all relevant respects to their comparator. Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1982); Smith v. Stratus Computer, Inc., 40 F.3d 11, 17 (1st Dr. 1994) (citing The Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989)). Such a showing would include evidence that the employees "dealt with the same supervisor, [were] subject to the same standards and . . . engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Mitchell, 964 F.2d at 583.

Plaintiffs identified Kevin Little, a white male, as their comparator. Little, another OIPE employee, applied for an accretion-of-duties promotion in 2000. In June 2000, OHR determined Little's position and duties warranted a promotion. Subsequently, Koontz submitted the appropriate form to personnel in support of Little's application. The promotion was approved and went into effect in July 2000.

The plaintiffs contend Little and the members of the Haywood Group were similarly situated because they both performed increased duties at a higher grade level over a substantial period of time. They argue "that a disparate application of the accretion-of-duties

criterion resulted in Mr. Little receiving the same type of promotion denied plaintiffs." Haywood, 2009 WL 1208111, at *6. However, the performance of additional work-related duties is not the only relevant factor. After considering the nature of their respective job duties and positions within the USPTO, we agree with the district court that the named comparator was actually quite dissimilar to the members of the Haywood Group. Little's position, management and program analyst, belonged to a separate Office of Personnel Management job family and series than the position of LIE, which fell within the Legal Instruments Examiner Series and Legal and Kindred Group job family. While Little was responsible for program management, development, and execution of automated systems within OIPE, as well as coordination with government contractors and various departments, LIEs primarily processed patent applications and reviewed the work of contractors involved in pre-examination processing. Little's position, prior to his promotion, was six grades above the LIEs. Koontz was Little's immediate supervisor, but Koontz, as Director of OIPE, was three managerial levels above the LIEs and Lead LIEs. Though a comparator need not be an exact match, the only similarities between Little and the Haywood Group plaintiffs are that they all worked for the USPTO in the early 2000s and applied for accretion-of-duties promotions. This is simply not enough. There are by no means "enough common features between the individuals to allow [for] a meaningful comparison." Humphries v. CBOCS West, Inc., 474 F.3d 387, 405 (7th Cir. 2007), aff'd on other grounds, 553 U.S. 442 (2008).

As the Haywood Group failed to show their comparator was similarly situated, they failed to make out a prima facie case of discrimination. Because the Haywood Group cannot establish a prima facie case of discrimination, the district court properly granted summary judgment to the defendant.

III.

The Haywood Group also argues the district court erred in dismissing its due process claims for lack of subject matter jurisdiction, and, in the alternative, for failure to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(1), (b)(6). In Count V of their complaint, the Haywood Group alleged they were subjected to an unconstitutional hostile work environment in violation of their Fifth Amendment rights to due process and equal protection under the law. The district court found the plaintiffs could not obtain a damages award against the defendant as an agency official in his official capacity under FDIC v. Meyer, 510 U.S. 471, 73 (1994). See also Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Because the plaintiffs were suing the United States, through the Commerce Secretary, named in his official capacity and, because the United States did not waive its sovereign immunity, the district court found it had no subject matter jurisdiction to hear plaintiffs' constitutional claims.

Nevertheless, no matter how the plaintiffs try to characterize their Fifth Amendment claims, the claims are premised on the assertion that the plaintiffs were intentionally discriminated against in their

employment because of race and gender. As explained by this Court in Middlebrooks v. Leavitt, Title VII provides plaintiffs' exclusive remedy. 525 F.3d 341, 349 (4th Cir. 2008) (holding that if an employee has a cognizable claim against federal officials under Title VII, then Title VII is his exclusive remedy for intentional discrimination in employment). Because the United States has clearly waived its sovereign immunity as to Title VII claims, see 42 U.S.C.A. § 2000e-16, the district court had subject matter jurisdiction over what were merely Title VII claims dressed in constitutional language. However, as we have previously held, plaintiffs' Title VII claims fail on the merits. Accordingly, we affirm the district court's dismissal of Count V of plaintiffs' complaint.[4]

AFFIRMED

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[4]Although the district court ruled in favor of the defendant on a different ground, we may affirm on any basis appearing in the record. See United States v. McHan, 386 F.3d 620, 623 (4th Cir. 2004).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Cherrie Haywood, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:08cv981
	)	(GBL)
Carlos M. Gutierrez,	)	
Secretary, United States	)	
Department of Commerce,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

THIS MATTER is before the Court on Defendant Carlos M. Gutierrez's Motion for Summary Judgment and Partial Motion for Dismissal. This case concerns the discrimination claims of ten Plaintiffs who allege that they were discriminated against when denied accretion-of-duties promotions within the United States Patent and Trademark Office ("USPTO"). There are three issues before the Court. The first issue is whether a comparator is similarly situated where the comparator receives a promotion through the same process under which Plaintiffs were denied promotions, but the comparator performs different job duties and his pay grade is six steps above that of

Plaintiffs. The second issue is whether Plaintiffs show pretext where Defendant's proffered reason for denying them promotions is that a desk audit revealed that Plaintiffs' job duties did not warrant promotion to a higher grade, but Plaintiffs present facts showing a history of inefficiencies in the USPTO's promotion process. The third issue is whether Plaintiffs' constitutional claims survive where Plaintiffs allege due process and equal protection violations against an agent of the United States government in his official capacity but the United States has not waived its sovereign immunity in the case.

The Court grants Defendant's Motion for Summary Judgment and Partial Motion for Dismissal. First, the Court holds that Plaintiffs fail to establish a prima facie case of discrimination because being subject to the same promotion process does not make a comparator similarly situated where his position and job duties are substantially different. Second, assuming, arguendo, that Plaintiffs were able to establish a prima facie case of discrimination, the Court holds that Plaintiffs fail to show pretext because proof of general inefficiencies in an employer's promotion process, without additional evidence of discrimination directed at individual Plaintiffs, is insufficient to create a genuine issue of fact regarding discriminatory motive. Third, the Court holds that Plaintiffs' constitutional claims fail under Rule 12(b)(1) because the United States has not waived its sovereign immunity and, alternatively, under Rule 12(b)(6) because Plaintiffs cannot bring *Bivens*

claims against an agent of the federal government in his official capacity. The Court's holdings are addressed fully in order below.

I. BACKGROUND

The case concerns the employment discrimination claims of ten similarly-situated current and former employees of the USPTO.[1] Plaintiffs allege that the USPTO unlawfully discriminated against them when it denied Plaintiffs accretion-of-duties promotions from GS-7 to GS-8 positions, yet granted an accretion-of-duties promotion to Mr. Kevin Little, a white male. Defendant Carlos Gutierrez, standing in as Defendant in his official capacity, now moves for summary judgment and partial dismissal of Plaintiffs' claims.

Plaintiffs are ten current and former employees of the USPTO's Office of Initial Patent Examination ("OIPE"). OIPE is a branch within the USPTO that receives incoming patent applications and screens them for completeness before forwarding them to the appropriate Patent Technology Center for examination.

In or around 2000, the OIPE was undergoing a major reorganization that implemented a new

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[1]Eight of the ten Plaintiffs are African American females: Ms. Cherrie Haywood, Ms. Theresa Williams, Ms. Kathy Nelson, Ms. Karen Smith, ms. Marian Day, Ms. Tushome Stokes, Ms. Deshawn Durham, and Ms. Roxanne Rawls. Plaintiff Eleanor Kurtz is a European American female. Plaintiff Mr. John Dills is an African-American male.

automated patent application processing system. As a result, many functions previously performed by federal employees were transferred to contract personnel and the automated system.

Among the employees most affected by OIPE's reorganization were the GS-7 Legal Instrument Examiners (LIEs"). Prior to the reorganization, the OIPE employed approximately one hundred LIEs. By August 2002, it employed only fifty-one total federal employees. Most of the OIPE's LIEs were reassigned to various Patent Technology Centers. One exception to this reassignment was a group of LIEs who stayed within OIPE and received temporary promotions to GS-8 Lead LIEs. These LIEs were promoted to help contract personnel transition and assume the duties originally performed by LIEs prior to the reorganization. Plaintiffs were all part of the excepted group of LIES that received temporary promotions to GS-8.

The primary difference between the GS-7 LIE position and the GS-8 Lead LIE position is that the Lead LIE performs supervisory functions. LIEs "examine and assigned docket of legal documents such as applications, petitions, notices, and other similar materials for compliance [with USPTO legal requirements]." (LIE Position Description, Gov't Ex. 2.) An LIE's major responsibilities include: checking applications for completeness and compliance with USPTO regulations; identifying errors or deficiencies in an application; preparing notices to customers detailing missing information and/or fees; maintaining the application's docket and

correspondence record; performing quality reviews of transactions processed by lower grade employees; and providing customer service regarding the application process and the status of pending applications. (Id.) In contrast, Lead LIEs "lead a team of [LIEs]"; each Lead LIE must lead a group "composed of at least three [LIEs]." (Lead LIE Position Description, Gov't Ex. 3.) A Lead LIE's major responsibilities include: directing daily duties of LIEs; making or providing input on selection and termination decisions; serving as acting supervisor in the supervisor's absence; providing input to the supervisor on the work-schedule priorities of the LIEs; managing the work flow of LIEs and coordinating with other Lead LIEs to facilitate the meeting of production quotas; training LIEs on all aspects of initial patent examination, including identifying problems and areas requiring additional training; and collaborating with other Lead LIEs and supervisors regarding the development of policies and procedures. (Id.)

Plaintiffs were aware that their promotions to GS-8 Lead LIEs were temporary and that they were not to exceed one year. Although the promotions were not to exceed one year, Plaintiffs' third-line supervisor and the director of OIPE, Mr. Thomas Koontz, persuaded the USPTO to extend and renew Plaintiffs' temporary promotions until 2002. In or around July 2002, all of the temporary GS-8 Lead LIEs, including Plaintiffs, were informed that their temporary positions would soon expire and that, beginning in August 2002, they would return to their original GS-7 levels.

Upon notification that their GS-8 promotions would soon expire, Plaintiffs sought accretion-of-duties promotions to maintain their GS-8 positions. An accretion-of-duties promotion is "[a] promotion resulting from an employee's position being classified at a higher grade because of additional duties and responsibilities." 5 C.F.R. § 335.103(c)(3)(ii). It is a noncompetitive promotion that allows an employee to obtain a higher GS level without going through the competitive process.

In the fall of 2002, the USPTO's Office of Human Resources ("OHR") conducted a desk audit of Plaintiffs' work tasks to determine whether accretion-of-duties promotions were warranted. A desk audit is a nonpersonal evaluation used to make sure that employees are being paid fairly for the duties that they actually perform. In a desk audit, the supervisor retains the responsibility of determining which position performs which specific duties, while the classifier who performs the desk audit compares the duties as determined by the supervisor against published Classification Standards. The classifier uses this comparison to determine the title, series, and grade of the position. The Classification Standards for a particular grade are established by the United States Office of Personnel Management ("OPM"), not the USPTO.

OHR Human Resources Specialists Ms. Gail Zamperini and Karen Long conducted the desk audit of Plaintiffs' work tasks. Both visited Plaintiffs' offices to conduct in-person interviews and to observe the daily tasks Plaintiffs performed. During the

desk audit, Plaintiffs had several opportunities to present information showing that a reclassification of their LIE positions was warranted. Plaintiffs received a ten-page questionnaire concerning their job tasks, were allowed to provide samples of their work product, and were informed to call or email OHR anytime to provide additional information.

Following the desk audit, OHR determined that Plaintiffs' position was properly classified at the GS-7 level. OHR issued a Position Evaluation Report, which detailed how OHR determined the classification. The Report first classified the LIE position within the job family "Legal and Kindred Group" and the series "Legal Instruments Examining Series." OHR also considered an alternate series, "Paralegal Specialist Series," before determining that the Legal Instrument Examining Series was a better fit. Within this series and title, Plaintiffs received the maximum factor-level assignments possible, with the exception of one factor, "Knowledge Required by the Position," to which OHR assigned the second-highest factor level.

According to Plaintiffs, several facts surrounding the desk audit indicate that the desk audit was a "sham". First, Ms. Long had never performed a desk audit prior to conducting Plaintiffs'. As a result, Plaintiffs' desk audit was instead a training exercise. Second, Ms. Zamperini provided Ms. Long little guidance during the desk audit and fell asleep during the desk audit interviews.

Plaintiffs filed a discrimination complaint after being denied accretion-of-duties promotions. Both the USPTO's Office of Civil Rights and the Equal Employment Opportunity Commission found no discrimination and issued a right to sue letter. Plaintiffs brought this suit alleging race and gender discrimination in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et seq., age discrimination in violation of the Age Discrimination in Employment act of 1967, as amended, 29 U.S.C. § 621, and constitutional violations. Defendant now moves for summary judgment on Plaintiffs' discrimination claims and dismissal of Plaintiffs' constitutional claims.

II. DISCUSSION

A. Standard of Review

1. Rule 56 Summary Judgment

Under Federal Rule of Civil Procedure 56, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a

genuine dispute exists. *Matsushita Elec. Indus. Co.v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-489. A "material fact" is a fact that might affect the outcome of a party's case. Id. At 248; *JKC Holding Co. V. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). Whether a fact is considered to be "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Rule 56(e) requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. V. Catrett*, 477 U.S. 317, 324 (1986).

2. Rule 12(b)(b) Dismissal

A Federal Rule of Civil Procedure 12(b)(6) motion should be granted unless an adequately stated claim is "supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. V. Twombly*, 127 S. Ct. 1955, 1969 (2007); see FED. R. CIVL. P. 12(b)(6). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff, read the complaint in the

light most favorable to the plaintiff, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). In addition to the complaint, the Court may also examine "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd*, 127 S. Ct. 2499, 2509 (2007). "Conclusory allegations regarding the legal effect of the facts alleged" need not be accepted. *Labram v. Hazel,* 43 F.3d 918, 921 (4th Cir. 1995). Because the central purpose of the complaint is to provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," the plaintiff's legal allegations must be supported by some factual basis sufficient to allow the defendant o prepare a fair response. *Conley v. Gibson,* 355 U.S. 41, 47 (1957).

B. Analysis

1. Title VII/ADEA Discrimination

The Court grants summary judgment for Defendant because Plaintiffs have not established a prima facie case of discrimination since their proffered comparator, Mr. Little, is not similarly situated. Assuming, arguendo, that Plaintiffs properly established a prima facie case of discrimination, their claims still fail because they fail to rebut Defendant's legitimate, nondiscriminatory reason for denying them promotions. Title Vii and ADEA discrimination claims are evaluated under the burden shifting rules

established by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

First, in order to establish a prima facie case of discrimination in the failure-to-promote context, the plaintiffs must show that 1) they were members of a protected class; 2) they applied for the position in question; 3) they were qualified for the position; and 4) the defendant rejected their application under circumstances that give rise to an inference of discrimination. *See Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 268 (4th Cir. 2001).[2]

Next, if the plaintiffs establish a prima facie case of discrimination, the burden shifts to the defendant "to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *See Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214 (4th Cir. 2007). This is a burden of production, not one of proof or persuasion, so the reasons proffered need not persuade the Court, be deemed credible, or even have been relied upon in making the employment decision. *See id.; St. Mary's Honor Ctr v. Hicks*, 50 U.S. 502, 509 (1993). This is so because the burden of proof and persuasion remains with the plaintiffs at all times. *Id.* At 511 (noting that the defendant's burden to offer a nondiscriminatory rationale "does

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[2]This framework applies, with little variation, to failure-to-promote claims whether based upon race, gender, or age. *See Westinghouse*, 406 F.3d at 268; *Hux v. City of Newport News, Va.*, 451 F.3d 311, 314 (4th Cir. 2006); *Laber v. Harvey*, 438 F.3d 404, 430 (4th Cir. 2006) (en banc).

not shift the burden of proof, [and that] . . . the Title VII plaintiff at all times bears the ultimate burden of persuasion." (Internal citations omitted)); *Mereish v. Walker*, 359 F.3d 330, 335 (4th Cir. 2004).

Finally, once the defendant states a nondiscriminatory reason for denying the promotions, the burden shifts back to the plaintiffs to prove by a preponderance of the evidence that the reasons offered were not the actual reasons, but were a pretext for discrimination. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Lettieri v. Equant, Inc.*, 478 F.3d 640, 646-47 (4th Cir. 2007). At this last step "the burden to demonstrate pretext merges with the ultimate burden of persuading the court that [the plaintiffs have] been the victim[s] of intentional discrimination." *See id.* (Quoting *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). The plaintiffs' "own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons." *Dockins v. Benchmark Comms.*, 176 F.3d 745, 749 (4th Cir. 1999), and their burden cannot be satisfied "by focusing on minor discrepancies that do not cast doubt on the explanation's validity, or by raising points that are wholly irrelevant to it. . ." *Hux*, 451 F.3d at 315.

Here, the Court finds that Plaintiffs fail to establish a prima facie case of discrimination. Assuming, arguendo, that Plaintiffs established a prima facie case of discrimination, the Court finds that they fail to rebut Defendant's nondiscriminatory

reasons for denying them promotions. The court addresses each holding in turn below.

a. Prima facie discrimination

The Court grant summary judgment for Defendant because Plaintiffs have not established a prima facie case of discrimination since the comparator they rely upon is not similarly situated.[3] In order for a comparator to be similarly situated, he must be "similar in all relevant respects." *See Heyward v. Monroe,* 166 F.3d 332 (4th Cir. 1998)

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[3]As a matter of law, Plaintiffs need not identify a similarly-situated comparator in order to state a prima facie case of Title VII/ADEA discrimination. See *Bryant v. Aiken Reg'l Med. Ctrs, Inc.,* 333 F.3d 536, 545-46 (4th cir. 2003). However, where the plaintiffs' discrimination allegations rely upon comparisons to a similarly-situated employee from a non-protected class, the plaintiffs' ability to state a prima facie case of discrimination depends upon the validity of their comparator. *Cf. Dennis v. Columbia Colleton Med. Ctr., Inc.,* 290 F.3d 639, 648 (4th Cir. 2002) (noting that where a "jury's finding of pretext does not stand or fall on [a comparison of the plaintiffs' qualifications with those of the successful candidate]," the jury's finding could be upheld). Here, the crux of Plaintiffs' argument is that they were denied accretion-of-duties promotions yet a similarly-situated white male, Mr. Kevin Little, was not. As such, the Court evaluates Plaintiffs' ability to state a prima facie case by considering the validity of Mr. Little as a similarly-situated comparator.

(table); *Telep v. Potter*, No. 2:04-cv-006, 2005 WL 2454103, at *7 (E.D. Va. 2005); *Reese v. C. Richard Dobson, Inc.*, No. 3:01-cv-181, 2001 U.S. Dist. LEXIS 12853, at *9-10 (#.D. Va. Aug. 23, 2001); see also *Holified v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997); *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 17 (1st Cir. 1994); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992); *Smith v. Monsanto Chem. Co.*, 770 F.2d 219, 723 (8th Cir. 1985). "[M]erely showing that an individual [is] involved in an analogous situation is insufficient." *Powell v. city of Norfolk*, No. 2:97-cv-73, 1998 U.S. Dist. LEXIS 15915, at *10 (E.D. Va. Aug. 17, 1998), aff'd by unpublished opinion, 181 F.3d 90 (4th Cir. 1999) (table).

Here, Plaintiffs argue that Mr. Little is similarly situated because both he and Plaintiffs performed increased job duties at a higher grade level over a substantial period of time, but that a disparate application of the accretion-of-duties criterion resulted in Mr. Little receiving the same type of promotion denied Plaintiffs. Hence, Plaintiffs argue that they have show disparate treatment among similarly-situated employees by showing the disparate application of this promotion criterion.

Plaintiffs' argument fails because Mr. Little is not similarly situated. Viewing the record in the light most favorable to Plaintiffs, even if both they and Mr. Little performed increased job duties for an extended period of time, the Court musts go beyond this similarity to determine whether Mr. Little is a similarly-situated comparator. As the weight of

authority suggests, the Court must look for similarities as to all relevant factors, not just one. Plaintiffs contend that the performance of additional duties is the only relevant factor in deciding their discrimination claims, but this position does not weigh several basic factors necessarily relevant to any failure-to-promote inquiry.

In addition to the performance of increased job duties, the Court must also consider the exact nature of the job duties and the employees' positions within the organization. In analyzing these additional factors, it si clear to the Court that Mr. Little is not a valid similarly-situated comparator for two reasons. First, Mr. Little's duties were far more complex than Plaintiffs'. Mr. Little coordinated with government contractors and various departments within the USPTO for automation system planning and led development teams that defined the requirements for the system, (*See* Little Position Evaluation Statement, Gov't Ex. 14; Accretion of Duties Promotion Justification, Gov't Ex. 13), but Plaintiffs' work was primarily within OIPE and involved no strategic planning (See LIE Position Evaluation Report, Gov't Ex. 10 at 6). These differences are important because Mr. Little cannot be similarly situated if his position consists of vastly different duties, as Defendant's reasons for promoting him are likely to be vastly different as well.

Second, Mr. Little's position is completely different from Plaintiffs'. Mr. Little was a GS-13 prior to his accretion-of-duties promotion, a full six grades above Plaintiffs. (See Gov't Ex. 11.) Further,

Mr. Little's position falls within the Program Analyst series, which is completely different than the Legal Instruments Examiner series. (See Gov't Exs. 10 and 14.) While Mr. Little was a program analyst responsible for program management, development, and execution of automated systems within OIPE (Gov't Ex. 14), Plaintiffs as LIEs primarily processed patent applications and reviewed the work of contractors involved in pre-examination processing (Gov't Ex. 10). Although the Court acknowledges that a similarly-situated comparator need not be Plaintiffs' exact match, the Court finds that these numerous relevant distinctions prevent Mr. Little from being a similarly-situated comparator and therefore Plaintiffs fail to show prima facie discrimination.

B. Pretext

Assuming, arguendo, that Plaintiffs sufficiently establish a prima facie case of discrimination, the Court grants summary judgment in Defendant's favor because there is no issue for trial as to pretext. In considering a plaintiff's discrimination claim against an employer, "[]he crucial issue [for the court] is an unlawfully discriminatory motive for a defendant's conduct, not the wisdom or folly of its business judgment." *Anderson*, 406 F.3d at 269 (quoting *Jiminez v. Mary Washington College*, 57 F.3d 369, 383 (4th Cir. 1995)). Likewise, a plaintiff cannot point to minor discrepancies in an employer's promotion process to rebut the nondiscriminatory reason articulated by the employer; negligence is not discrimination and

cannot sustain an action brought under Title VII and the ADEA. *See DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998); *Smith v. Univ. of North Carolina*, 632 F.2d 316, 346 (4th Cir. 1980) ("[T]he law does not require, in the first instance, that employment be rational, wise, or well-considered - only that it be nondiscriminatory.").

Here, Defendant offers a well-documented, nondiscriminatory reason for denying Plaintiffs promotions, which Plaintiffs simply fail to rebut. First, OHR personnel performed a thorough desk audit and agreed on Plaintiffs' ultimate classification. During the desk audit, Plaintiffs had several opportunities to provide OHR with information regarding their job duties. (Gov't Exs. 7 and 18.) The desk audit was a coordinated effort by personnel within three separate divisions of the USPTO, its Office of Civil Rights, OHR, and OIPE. (Gov't Ex. 18 ¶ 12.) Second, OHR issued a Position Evaluation Report, which provided a comprehensive justification for the nonpromotion decision. The eight-page Position Evaluation Report examined the "Paralegal Specialist Series" before determining that the "Legal Instruments Examining Series" was a better fit for Plaintiffs' position. (Gov't Ex. 10 at 2-3.) Within this series and title, Plaintiff received the maximum factor-level assignments possible, with the exception of one factor, "Knowledge Required by the Position", to which OHR assigned the second-highest factor level. (See Gov't. Exs. 10 and 25.) The report provided an in-depth explanation for why Plaintiffs' received the second-highest factor level. (Gov't Ex. 10 at 3-6.)

In response to defendant's proffered nondiscriminatory reason for denying the promotion, Plaintiffs simply argue that numerous problems with the desk audit prove that they were denied promotions for discriminatory reasons. However, the Court rejects Plaintiffs' premise that Defendant's proffered reason is pretext just because the desk audit was not perfect. As mentioned above, the Court's inquiry is focused on discrimination, not negligence. Nothing in the facts Plaintiffs' present point to a discriminatory motive. Plaintiffs do not assert that any USPTO official used any racially derogatory language or referred to gender or age in any part of the promotion process. While Plaintiffs may differ with the USPTO's business judgment, Plaintiffs have not responded with admissible evidence that the USPTO's judgment was motivated by race, gender, or age.

Plaintiffs likewise attempt to argue pretext by pointing to statistics showing a long history of problems with the USPTO's promotion process. The Court rejects Plaintiffs' argument because statistical evidence alone is insufficient to establish discriminatory motive. In searching for discriminatory motive, statistics are only useful in their ability to provide proper context. *See Anderson*, 406 F.3d at 263. Here, Plaintiffs argue that the USPTO's history of problems coupled with the specific problems that occurred during the desk audit are sufficient evidence of discrimination but, if anything, these specific examples are just more evidence of a general problem; they do not implicate discrimination as to employment decisions as to the

individual Plaintiffs' promotion requests. General promotions issues are properly within the realm of personnel and business judgment and the courts are not suited to re-examine personnel matters unconnected with civil rights protections. As such, the Court grants summary judgment for Defendant on Plaintiffs' Title VII and ADEA claims.

2. Constitutional Claims

The Court grants Defendant's motion to dismiss Plaintiffs' constitutional claims pursuant to Rule 12(b)(1) because the United States had not waived its sovereign immunity from suit and, alternatively, pursuant to Rule 12(b)(6) because Plaintiffs fail to state a claim for which relief can be granted. A Court should grant a Rule 12(b)(1a) motion if the jurisdictional facts are undisputed and the movant is entitled to prevail as a matter of law. *Evans v. B.F. Perkins, Co.*, 166 F.3d 642, 647 (4th Cir. 1999). In claims against the United States, a court lacks jurisdiction unless the government waives its sovereign immunity. *See United States v. Jones*, 225 F.3d 468, 470 (4th Cir. 2000) ("Sovereign immunity deprives a court of jurisdiction.").

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Supreme Court recognized a limited damages remedy against federal officers sued in their individual capacities, but the Court has firmly held that no *Bivens* action lies against the United States or its agencies. *See FDIC v. Meyer*, 510 U.S. 471, 473 (1994). The same is true for suits brought against agency officials in their official

capacities. *Doe v. Chao*, 306 F.3d 170, 184 (4th Cir. 2002), aff'd on other grounds, 540 U.S. 614 (2004).

Here, it is clear that Plaintiffs' suit is against the United States through Defendant, named as defendant in his official capacity. The Complaint begins, "[t]his is an action for damages, backpay, injunctive and other relief against an agency of the federal government . . . ." (Compl. ¶ 1.) It is clear, however, that the United States has not waived its sovereign immunity. It is also clear that Plaintiffs cannot obtain a damage award against Defendant as an agency official sued in his official capacity. Consequently, the Court dismisses Plaintiffs' constitutional claims pursuant to Rule 12(b)(1) because the United States has not waived its sovereign immunity. Alternatively, the Court dismisses Plaintiffs' constitutional claims pursuant to Rule 12(b)(6) because Plaintiffs' *Bivens* claim fails as a matter of law.

III. CONCLUSION

The Court holds that Plaintiffs fail to establish a prima facie case of discrimination because being subject to the same promotion process does not make a comparator similarly situated where his position and job duties are substantially different. Assuming, arguendo, that Plaintiffs were able to establish a prima facie case of discrimination, the Court holds that Plaintiffs fail to show pretext because proof of general inefficiencies in an employer's promotion process, without additional evidence of discrimination, is insufficient to prove

discriminatory motive. Finally, the Court holds that Plaintiffs' constitutional claims fail under Rule 12(b)(1) because the United States has not waived its sovereign immunity and, alternatively, under Rule 12(b)(6) because Plaintiffs cannot bring *Bivens* claims against an agent of the federal government in his official capacity. Therefore, it is hereby

ORDERED that Defendant's Motion for Partial Dismissal and for Summary Judgment is GRANTED.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 30th day of April, 2009.

/s/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
04/30/09

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Cherrie Haywood, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:08cv981
	)	(GBL)
Carlos M. Gutierrez,	)	
Secretary, United States	)	
Department of Commerce,	)	
	)	
Defendant.	)	

FINAL JUDGMENT

THIS MATTER is before the Court on Defendant Carlos M. Gutierrez's Motion for Summary Judgment and Partial Motion for Dismissal. In its Order entered on April 30, 2009, the Court granted Defendant's Motion. From the foregoing, it is hereby

ORDERED that JUDGMENT is ENTERED in favor of Defendant Carlos M. Gutierrez, Secretary, United States Department of Commerce against Plaintiffs.

The Clerk is DIRECTED to ENTER JUDGMENT pursuant to Federal Rule of Civil Procedure 58.

The Clerk is directed to forward a copy fo this Order to Counsel.

Entered this 30th day of April, 2009.

/s/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
04/30/09

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CHERRIE HAYWOOD, et al.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No.
	:	1:08-cv-981
	:	(GBL/JFA)
	:	
CARLOS M. GUTIERREZ, Secretary, United States Department of Commerce	:	
	:	
	:	
	:	
Defendant.	:	

AFFIDAVIT OF PAUL A. KATZ

I, PAUL A. KATZ, after being duly sworn and deposed, declare that I am over the age of eighteen and I am competent to state the following matters:

Qualifications:

I, Paul A. Katz, have been employed as a personnel consultant and expert witness since my

retirement from the federal government in 1985. During the principal part of my 30 year Federal career I was employed as a member of the Senior Executive Service, as an Assistant Director of the Office of Personnel Management, specializing in staffing, pay, classification and qualifications.

Approximately one half of my post retirement work has involved serving as an expert witness in employment litigation, usually on the side of employees. The other half involved consulting for employers (principally the Federal government). During these latter twenty-three (23) years I have served over five-hundred (500) litigation and contract consulting clients; as well as being accepted as an expert witness by Federal district court judges, administrative judges, and hearing officers.

Professionally, I have served as an elected President or Board Member of several national professional associations, as well as receiving their awards for my service. I earned a Bachelors and Masters degree from the University of Wisconsin.

Agency's Basis for Accretion of Duties Promotion:

I have reviewed, among other things, the attached Agency's Accretion of Duties Promotion Justification sheet for PTO/OIPE employee, Kevin Little. The Agency's basis for accretion of duties promotion is set forth as follows:

1. Basis for the accretion of promotion:

"A. The "old" position has been absorbed into the new position. The employee continues to perform the same basic functions, and the additional duties represent an outgrowth of the "old" position over a significant period of time (usually six months but not less than three).

or

B. A program change requires (required) the immediate performance of additional duties that only the subject employee is (was) capable of performing.

2. If the accretion promotion is based on situation A. (As stated above), briefly describe the additional higher level duties the employee has assumed and indicate the approximate period of time (i.e., the number of months) the employee has actually performed those higher level duties;

3. If the accretion is based on situation B. (As stated above), briefly describe the program change and the additional, higher level duties the employee must

> (was required) to perform as a result of the change."

The attached Agency's Accretion of Duties Promotion Justification sheet for PTO/OIPE employee, Kevin Little was signed on June 23, 2000 by Thomas L. Koontz as Director, OIPE. Mr. Koontz has check situation A as the basis for Mr. Little's accretion of duties promotion. Also, Mr. Koontz has provided on the justification sheet a brief description of the additional higher level duties Mr. Little has assumed and an approximate time period Mr. Little actually performed the described higher duties. The area on the accretion justification sheet referencing situation B for accretion promotion is left blank by Mr. Koontz regarding Mr. Little.

Statement of Opinions:

Based on my education, background, experience in the field and a review of the records, I am prepared to testify to the following opinions to a reasonable degree of certainty:

From about 1998 and continuing at least through 2002 two groups of employees in the Office of Initial Patent Inspection, a part of the Commerce Department's Patent and Trademark Office were being impacted by management and legislative action that changed the wa[y] patent applications were received and processed, prior to their legal examination. One group includes Kevin Little, who assisted in developing new procedures; the other group of at least eleven employees, i.e., Cherrie Haywood, Theresa Williams,

Kathy Nelson, Karen Smith, Marian Day, Tushome Stokes, Deshawn Durham, Roxanne Rawls, Eleanor Kurtz and John Dill (referred to hereafter as "the Cherrie Haywood group") was responsible for carrying out new and more complex procedures exacerbated by the insertion of a contractor workforce in their midst. Kevin Little carried the title of Program Analyst, the Cherrie Haywood group carried the titles of Legal Instrument Examiners (LIE's).

Management properly noted the personnel management impact of the above new and more complex procedures on these two groups. In proper response they promoted Kevin Little from GS-12 to GS-13 and later to GS-14. The Cherrie Haywood group of at least eleven were similarly promoted from GS-7 to GS-8. However, Kevin Little's promotion was permanent, but the Cherrie Haywood group's promotion was temporary. In my opinion, the disparate treatment in the completion of (and failure to complete) the Accretion of Duties Justification Sheet by Mr. Koontz was the real difference in the receipt of a permanent promotion based on accretion of duties.

Consequently, after a year or so the eleven member Cherrie Haywood group of LIE's were demoted from G-8 to GS-7, still Legal Instrument Examiners and still performing the same enhanced duties. Kevin Little remained a GS-14. Management's apparent rationale for demoting (GS-8 to GS-7) the eleven member Cherrie Haywood group was "their time had come" because they had only been temporarily promoted for a limited period of time. However, Kevin Little, promoted for the same underlying reason (new

and more complex work over a significant period of time) was allowed to permanently keep his higher grade on the basis of "accretion of duties."

The records shows no merit system reason for treating the two groups differently. That is, treating one promotion as a permanent "accretion of duties" and the other as a temporary promotion, when both actions were intrinsically based on the impact of the exact same working conditions.

The two groups should have received the same treatment. As long as Kevin Little's promotion remains, the Cherrie Haywood group of at least eleven Legal Instrument Examiners should have their promotions to GS-8 remain. For purposes of accretion of duties purposes based on situation A of the Agency's basis for accretion promotion in OIPE, both groups were similarly situated under the direction of Mr. Koontz, the person who completes the accretion justification sheet as Director of OIPE.

I attest to the veracity of the foregoing statement subject to the penalty of perjury.

/s/ PAUL A. KATZ _____ January 9, 2009 _____
Paul A. Katz, Affiant Date

APPENDIX E

ACCRETION OF DUTIES
PROMOTION JUSTIFICATION

Employee's Name: Kevin Little

1.) Basis for the accretion of promotion:

(X) A. The "old" position has been absorbed into the new position. The employee continues to perform the same basic functions, and the additional duties represent an outgrowth of the "old" position over a significant period of time (usually six months but not less than three).

Or

( )B. A program change requires (required) the immediate performance of additional duties that only the subject employee is (was) capable of performing.

2.) If the accretion promotion is based on situation A. (as stated above), briefly describe the additional higher level duties the employee has assumed and indicate the approximate period of time (i.e., the number of months) the employee has actually performed those higher level duties;

Over the past 2 years, the complexity and significance of Mr. Little's duties has increased due to the development and implementation of the Revenue

Accounts Management System, the Patent Application Capture and Review System and the PreExam system. Most recently Mr. Little was the primary analyst responsible for development and deployment of the PALM Migration PreExam system. This system is used by over 600 people in the Patent and Trademark Office. Mr. Little led development teams that defined the requirements for the system. He evaluated and approved the functional design of the system. For deployment, Mr. Little developed and implemented the testing plan. Mr. Little continues to direct a team of analysts and development staff that maintain and improve the system. Mr. Little makes or recommend decisions concerning these systems and the related business processes, rules and procedures that impact all major operating units in the Patent organization and in business units not in the Patent organization.

Since January of 2000, Mr. Little is responsible for system and business process design to implement the American Invention Protection Act. This act requires for the first time the publication of pending patent applications. All systems, for which Mr. Little has had the primary role for developing, require extensive modification. For the first time, the Office of Initial Patent Examination will capture electronically, all the information necessary to publish patent applications. This new program will require new rules, processes, and business procedures.

To accomplish these objectives, Mr. Little must direct the work of a team of analysts. Mr. Little has contact with patent policy writers to influence rules and practices. Mr. Little is in contact with a wide variety

of system developers, managers, programmers, database administrators, network administrators, and other hardware and software specialists to develop and deploy systems and resolve processing issues. Mr. Little has contact with business area directors and managers to resolve system requirement and design issues and to coordinate deployment and maintenance.

3.) If the accretion is based on situation B (as stated above), briefly describe the program change and the additional, higher level duties the employee must (was required) to perform as a result of the change:

SUBMITTED BY: /s/ (Signature) Thomas L. Koontz (Typed/Printed Name)

Director, OIPE (Title) 06/23/00 (Date)